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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CITY OF SAN JOSE, Plaintiff and Appellant, v. INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, Defendant and Respondent.	H034726 (Santa Clara County Super. Ct. No. CV142109)

In this appeal, the City of San Jose challenges the confirmation of a labor arbitrator's award, which ordered reinstatement of Michael Baldwin. The City had discharged Baldwin from his job as a fire inspector for sexually harassing co-workers. Baldwin grieved his discharge with the aid of his union, International Association of Firefighters, Local 230. The matter was arbitrated as provided in the labor agreement between the City and the Union. The arbitrator found the sexual harassment allegations true, but he nevertheless ordered Baldwin's reinstatement, based in part on the City's failure to impose progressive discipline as contractually required.

For reasons explained below, we reject the City's argument that Baldwin's reinstatement violates public policy. We therefore affirm the judgment confirming the arbitration award.

BACKGROUND

In November 1990, Baldwin began working for the City as a firefighter. In July 2007, he was promoted to the position of fire inspector.

In April 2008, a co-worker complained about Baldwin's inappropriate behavior toward herself and other female employees, prompting an investigation by the City. The investigation concluded with a 23-page report, issued in June 2008, which found that Baldwin had violated the City's policy against harassment by engaging in inappropriate behavior toward female co-workers, including both verbal comments and physical touching.

In July 2008, Baldwin was fired for sexual harassment.

PROCEDURAL HISTORY

The Union challenged Baldwin's termination by filing a grievance on his behalf. The grievance proceeded to arbitration, as provided by the Union's labor agreement with the City.

Arbitration

The arbitration was conducted by Charles A. Askin, who held an evidentiary hearing over the course of several days in December 2008 and January 2009.

In April 2009, the arbitrator issued a 26-page decision.[1] The arbitrator described the issue before him as follows: "Did the City have just cause to terminate the Grievant, Michael Baldwin; and, if not, what should be the remedy?"

[1] In his written decision, titled "opinion and award," the arbitrator refers to Baldwin as "Grievant." A redacted version of the decision is contained in the appellate record, which omits witnesses' names and other identifying information.

First, the arbitrator gave a detailed account of the evidence relating to Baldwin's discharge. He concluded that Baldwin had "committed two levels of offenses under the City's sexual harassment policy." The first level, while less serious, involved "repeated, multiple, and pervasive acts of sexual harassment, or otherwise inappropriate behavior, toward four different female employees. This inappropriate behavior included, *inter alia*, placing his hands on female (and male) employees without their permission or imprimatur, touching or caressing the shoulders or backs of female employees and/or giving unsolicited massages or back rubs to female employees, lurking around employees' work spaces and scaring them, staring at female employees, asking women for their personal telephone numbers (in one case securing a female employee's personal telephone number without her consent), implying that he had relationships with female employees (some of whom were married or had known relationships with other men), and engaging in non-work related banter which could be construed as being of a sexual nature." The second level of offenses involved Baldwin's "more serious physical misconduct against [one co-worker] by administering birthday 'spankings' in the workplace without her consent, forcibly kissing her on the mouth without her consent, and inserting his hand between her legs and grabbing her right thigh near her crotch without her consent."

Next, the arbitrator reviewed both the City's policies and the procedural background of its disciplinary action against Baldwin. He concluded "that 1) all violations of the sexual harassment policy do not warrant the ultimate penalty of termination under the City's own enforcement policies, and 2) the City did not apply progressive discipline for Grievant's violations of the sexual harassment policy." The arbitrator determined that the first level of offenses, in combination, "warranted, at minimum, a written reprimand and arguably a short disciplinary suspension." By contrast, the second level of offenses, "(the kissing, spanking,

and thigh-grabbing transgressions) . . . warranted more serious initial discipline, such as a suspension." In the arbitrator's view, however, "the ultimate penalty of termination for all proven offenses, particularly in view of the City's prior lax disciplinary response . . . was contrary to the established principles of progressive discipline and was an excessive penalty in view of Grievant's tenure of service, his prior disciplinary record, and all the circumstances disclosed in this record."

Lastly, the arbitrator rendered his award, which provides in pertinent part: "1. The City did not have just cause to terminate Grievant. There was just cause for a disciplinary suspension, without pay, for 30 work days based on the proven multiple violations of the City's sexual harassment policy. [¶] 2. The City will rescind the termination notice in lieu of a suspension for 30 work days, accompanied by a 'Last Chance' Final Warning to Grievant that any proven further infraction of the City's sexual harassment policy will result in immediate termination. [¶] 3. The City shall offer to reinstate Grievant; however, upon his reinstatement Grievant shall be re-assigned to a different work site. . . . The City shall make Grievant whole for all lost wages (less the 30 work day suspension) and make him whole for all other lost contract benefits."

Proceedings in the Trial Court

The City petitioned the trial court to vacate the arbitration award. The Union cross-petitioned to confirm the award. The parties filed cross-motions to vacate and confirm, supported by legal memoranda.

Following a hearing in July 2009, the court entered a formal order granting the Union's motion to confirm the arbitration award. In the court's words, "the arbitrator did not exceed his power, pursuant to Code of Civil Procedure section 1286.2." The court noted the general rule that courts do "not review the merits of the arbitration award" as well as the exception that applies "when the arbitrator's

decision runs contrary to public policy." But as the court further explained, an award reinstating an employee will not be vacated unless the public policy "entails an obligation to automatically terminate the employee upon violation of the policy." In this case, the court reasoned, "there is no explicit obligation to automatically terminate an employee upon violation of the sexual harassment policy," particularly since City procedures instead call for progressive discipline.

In August 2009, the court entered judgment, which (1) granted the Union's cross-petition and motion to confirm the arbitration award for the reasons set forth in its order, and (2) denied the City's petition and motion to vacate for the same reasons.

Appeal

The City filed a timely notice of appeal from the judgment. In its opening brief on appeal, the City argues that the arbitration award should be vacated because it contravenes the public policy against sexual harassment.

The Union disagrees, arguing that the City failed to show that sexual harassment in general is a valid public policy ground for vacating the award. The Union also contends that the City's appeal is frivolous, warranting sanctions and an award of other compensatory damages.

In reply, the City defends its appellate position on the merits, opposes the Union's request for sanctions and for compensatory damages, and itself seeks sanctions against the Union.

DISCUSSION

As a framework for our discussion of the arbitration award, we first summarize the governing legal principles. Next, we apply those principles to this case. Finally, we consider the parties' requests for sanctions.

I. Legal Principles

A. Arbitration Agreements

"The powers of an arbitrator derive from, and are limited by, the agreement to arbitrate." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 375.) As the United States Supreme Court has explained in the context of labor arbitration, "an arbitrator's award 'must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice.' " (*Eastern Associated Coal Corp. v. Mine Workers* (2000) 531 U.S. 57, 61 (*Eastern Coal*), quoting *Paperworkers v. Misco, Inc.* (1987) 484 U.S. 29, 38.)

B. Vacating Arbitration Awards

1. California Law

The grounds for vacating an arbitration award are set forth in Code of Civil Procedure section 1286.2.[2] The statutory grounds are exclusive. (*Moncharsh v.*

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[2] Unspecified statutory references are to the Code of Civil Procedure.

Section 1286.2, subdivision (a), sets forth the following grounds for vacating an arbitration award: "(1) The award was procured by corruption, fraud or other undue means. [¶] (2) There was corruption in any of the arbitrators. [¶] (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. [¶] (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. [¶] (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. [¶] (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives."

Heily & Blasé (1992) 3 Cal.4th 1, 28 (*Moncharsh*).) Here, the pertinent statutory ground for vacatur is this: "The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (§ 1286.2, subd. (a)(4).)

"Under section 1286.2, subdivision (a)(4), an arbitrator exceeds his powers by acting without subject matter jurisdiction, deciding an issue that was not submitted to arbitration, arbitrarily remaking the contract, upholding an illegal contract, issuing an award that violates a well-defined public policy or a statutory right, fashioning a remedy that is not rationally related to the contract, or selecting a remedy not authorized by law." (*Gravillis v. Coldwell Banker Residential Brokerage Co.* (2010) 182 Cal.App.4th 503, 511 (*Gravillis*).) "In other words, an arbitrator exceeds his powers when he acts in a manner not authorized by the contract or by law." (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443; accord, *O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1056.)

Section 1286.2 states that "a court *shall* vacate an award" if it makes the predicate determination that the arbitrator has exceeded his power. (*O'Flaherty v. Belgum, supra,* 115 Cal.App.4th at p. 1055; *Department of Personnel Admin. v. California Correctional Peace Officers Assn.* (2007) 152 Cal.App.4th 1193, 1200 (*DPA v. CCPOA*).)

2. Federal Law

"Title 9 of the United States Code, section 10, is the United States Arbitration Act vacatur provision." (*SWAB Financial v. E*Trade Securities* (2007) 150 Cal.App.4th 1181, 1197.) The parties do not assert that the federal statute applies here. But to the extent that the federal and state provisions "are similar, we may consider persuasive federal authority." (*Id.* at p. 1197.) The cognate federal provision permits vacation of an arbitration award "where the

arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." (9 U.S.C. § 10, subd. (a)(4).)

C. Judicial Review

"It is well settled that the scope of judicial review of arbitration awards is extremely narrow." (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 943; accord, *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327 (*City of Palo Alto*).) "Courts may not review the merits of the controversy, the sufficiency of the evidence supporting the award, or the validity of the arbitrator's reasoning." (*DPA v. CCPOA, supra*, 152 Cal.App.4th at p. 1200.) Furthermore, judicial review is limited to "those cases in which there exists a statutory ground to vacate or correct the award." (*Moncharsh, supra*, 3 Cal.4th at p. 28.) That includes cases in which the arbitrator has exceeded his powers by issuing an award that "violates a party's statutory rights or otherwise violates a well-defined public policy." (*DPA v. CCPOA*, at p. 1200.) Nevertheless, in the absence of "a clear expression of illegality or public policy undermining [the] strong presumption in favor of private arbitration, an arbitral award should ordinarily stand immune from judicial scrutiny." (*Moncharsh*, at p. 32.) "The normal rule of limited judicial review cannot be avoided except in those rare cases where 'according finality to the arbitrator's decision would be incompatible with the protection of a statutory right' or where the award contravenes 'an explicit legislative expression of public policy.' " (*City of Palo Alto*, at p. 334, quoting *Moncharsh*, at pp. 32-33.)

"In determining whether an arbitrator exceeded his powers, we review the trial court's decision de novo, but we must give substantial deference to the arbitrator's own assessment of his contractual authority." (*O'Flaherty v. Belgum,*

supra, 115 Cal.App.4th at p. 1056.) On the other hand, whether a labor arbitrator's decision to reinstate an employee violates public policy presents a legal question, which we review de novo. (*Chrysler Motors Corp. v. International Union, Allied Indus. Workers of America, AFL-CIO* (7th Cir. 1992) 959 F.2d 685, 687 (*Chrysler Motors*); *PaineWebber, Inc. v. Agron* (8th Cir. 1995) 49 F.3d 347, 350; see *W.R. Grace & Co. v. Rubber Workers* (1983) 461 U.S. 757, 766 (*W.R. Grace*) ["the question of public policy is ultimately one for resolution by the courts"].)

With the foregoing principles in mind, we examine the arbitration award in this case, first in relation to the labor agreement and then in relation to the policy against sexual harassment.

II. Analysis

A. Was the arbitrator's decision to reinstate Baldwin drawn from the labor agreement?

We first consider "whether the arbitrator's decision to modify the punishment of an employee drew its essence from the" labor agreement. (*Westvaco Corp. v. United Paperworkers Intern.* (4th Cir. 1999) 171 F.3d 971, 975 (*Westvaco*).) The question is whether "employer and union have granted to the arbitrator the authority to interpret the meaning of their contract's language, including such words as 'just cause.' " (*Eastern Coal, supra,* 531 U.S. at p. 61; see *Westvaco,* at p. 975.)

In this case, the City challenges the award on public policy grounds alone. The City makes no contention that the award exceeds the arbitrator's contractual authority as derived from the language of the labor agreement. That being so, "we must assume that the collective-bargaining agreement itself calls for . . . reinstatement." (*Eastern Coal, supra,* 531 U.S. at p. 61.) "We must then decide

whether a contractual reinstatement requirement would fall within the legal exception that makes unenforceable 'a collective-bargaining agreement that is contrary to public policy.' " (*Id.* at p. 62, quoting *W.R. Grace, supra,* 461 U.S. at p. 766.)

In assessing the City's claim that the award violates the public policy against sexual harassment, we proceed in two steps. We first consider the policy's existence and nature; we then analyze whether Baldwin's reinstatement violates the policy.

B. Is there an explicit public policy against sexual harassment?

An arbitration award may be vacated on grounds that it violates public policy. (*Eastern Coal, supra,* 531 U.S. at p. 62; *City of Palo Alto, supra,* 77 Cal.App.4th at pp. 339-340.) But "any such public policy must be explicit, well defined, and dominant. It must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." (*Eastern Coal,* at p. 62, internal quotation marks and citations omitted.)

As we now explain, an explicit, well-defined, dominant policy against sexual harassment is recognized under both federal and state law.

1. Federal Law

"The public policy against sexual harassment in the work place is well-recognized." (*Chrysler Motors, supra,* 959 F.2d at p. 687.) It is reflected in case law, including United Supreme Court precedent, and in federal statutes and regulations. (*Ibid*.; see *Meritor Savings Bank, FSB v. Vinson* (1986) 477 U.S. 57, 64 ["unwelcome sexual advances that create an offensive or hostile working environment violate Title VII"]; 42 U.S.C. § 2000e-2; 29 C.F.R. § 1604.11.) The policy against sexual harassment in the workplace thus "can be ascertained by reference to law and legal precedent." (*Stroehmann Bakeries, Inc. v. Local 776,*

Intern. Broth. of Teamsters (3rd Cir. 1992) 969 F.2d 1436, 1441 (*Stroehmann*).) "Employers must take all necessary steps to prevent sexual harassment in the work place, such as expressing strong disapproval of the conduct and developing appropriate sanctions." (*Chrysler Motors*, at pp. 687-688.)

As these authorities reflect, federal law recognizes "an explicit, well-defined, and dominant public policy against sexual harassment in the work place." (*Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO.* (2nd Cir. 1990) 915 F.2d 840, 841 (*Newsday*).)

2. California Law

"Like federal law, California law prohibits sexual harassment in the workplace." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1042.) Statutory prohibitions against discrimination and harassment are found in California's Fair Employment and Housing Act (FEHA), codified at Government Code sections 12900 to 12996. California also has regulations addressing sexual harassment. (2 Cal. Code Regs. § 7287.6, subd. (b).) "Since 1985, the FEHA has prohibited sexual harassment of an employee." (*Hughes v. Pair*, at p. 1042, citing Gov.Code, § 12940, subd. (j)(1); see also, e.g., *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 90.) Under FEHA, harassment is unlawful if the employer "knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (Gov. Code, § 12940, subd. (j)(1).) These FEHA provisions "represent a fundamental public policy decision regarding 'the need to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination.' " (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 277, quoting *Brown v. Superior Court* (1984) 37 Cal.3d 477, 485.)

As these authorities reflect, California has an explicit, well-defined, and dominant public policy against sexual harassment in the workplace.

That conclusion brings us to the next step in the analysis, an assessment of whether the arbitrator's decision to reinstate Baldwin violates the policy against sexual harassment in the workplace.

C. Does Baldwin's reinstatement violate public policy?

At the outset, it is important to clarify that "the question to be answered is not whether [Baldwin's conduct] itself violates public policy, but whether the agreement to reinstate him does so." (*Eastern Coal, supra,* 531 U.S. at pp. 62-63.) "If a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars *reinstatement.*" (*Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, Intern. Assn. of Machinists and Aerospace Workers* (9th Cir. 1989) 886 F.2d 1200, 1212 (*Stead Motors*).) Thus, "the critical inquiry is not whether the underlying act for which the employee was disciplined violates public policy, but whether there is a public policy barring *reinstatement* of an individual who has committed a wrongful act." (*Id.* at p. 1215; see also, e.g., *Clear Channel Outdoor, Inc. v. International Unions of Painters and Allied Trades, Local 770* (7th Cir. 2009) 558 F.3d 670, 679; *Super Tire Engineering Co. v. Teamsters Local Union No. 676* (3rd Cir. 1983) 721 F.2d 121, 125, fn. 6.)

1. No public policy against reinstatement

The Legislature has addressed the problem of sexual harassment in the workplace via "the two main purposes of the FEHA – compensation and deterrence." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1044.) Concerning deterrence, "the Legislature wanted employers to establish effective policies and complaint procedures to stop workplace sexual harassment. . . ." (*Id.* at p. 1048.) The specific statutory language of FEHA requires employers to take "appropriate corrective action." (Gov. Code, § 12940,

subd. (j)(1).) Accompanying regulations require employers to take "reasonable steps to prevent harassment from occurring." (2 Cal. Code Regs. § 7287.6, subd. (b)(3).) "Such steps may include affirmatively raising the subject of harassment, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under California law, and developing methods to sensitize all concerned." (*Ibid.*)

Nothing in the statute or regulations reflects a public policy mandating termination as a sanction for sexual harassment. Rather, employers are charged with addressing harassment by taking "appropriate corrective action." (Gov. Code, § 12940, subd. (j)(1).) Employers are charged with preventing harassment by such means as "expressing strong disapproval" and "developing appropriate sanctions" to discipline offending employees. (2 Cal. Code Regs. § 7287.6, subd. (b)(3).) Federal law has nearly identical provisions.[3] As observed in persuasive federal case law: "Nowhere in this litany of prevention and correction is there the suggestion that every employee who makes a mistake must automatically lose his or her job." (*Westvaco, supra,* 171 F.3d at p. 977.) This

[3] The federal regulations are contained in guidelines issued by the Equal Employment Opportunity Commission (EEOC). In pertinent part, the guideline concerning sexual harassment provides: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." (29 C.F.R. § 1604.11(d) (2010).) It further provides: "Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned." (29 C.F.R. § 1604.11(f) (2010).)

court made a similar observation in *City of Palo Alto, supra,* 77 Cal.App.4th 327. Addressing the public policy against workplace violence, this court found no indication "that the public policy entails the obligation to automatically fire any employee" who engages in such misconduct. (*Id.* at p. 337.)

The authorities cited by the City do not persuade us to the contrary.

The City relies heavily on *Newsday*, *supra*, 915 F.2d 840. In that case, the Second Circuit affirmed the vacatur of an arbitration award ordering reinstatement. (*Id.* at p. 845.) The facts of *Newsday* are singular. As explained in a later decision of the Second Circuit, the *Newsday* "employee was a repeat sexual offender who had been reinstated once before following a prior incident of sexual harassment with a warning by that arbitrator that any further harassing behavior 'shall be grounds for immediate discharge.' [Citation.] Thus, vacating the second arbitrator's reinstatement had the effect of upholding the first arbitral award." (*Saint Mary Home v. Service Employees Intern. Union, Dist. 1199* (2nd Cir. 1997) 116 F.3d 41, 47.) That point was noted in the *Newsday* decision itself. (*Newsday,* at p. 845.) As the *Newsday* court stated, the award of reinstatement issued by the second arbitrator, Adelman, "completely disregarded the public policy against sexual harassment in the work place. The arbitrator has also disregarded [the first arbitrator] Sabatella's ruling that any further acts of harassment by [the employee] Waters would be grounds for discharge." (*Ibid*.) Beyond that, the *Newsday* court concluded, "Adelman's award condones Waters' latest misconduct; it tends to perpetuate a hostile, intimidating and offensive work environment. Waters has ignored repeated warnings. Above all, the award prevents [the employer] Newsday from carrying out its legal duty to eliminate sexual harassment in the work place." (*Ibid.*)

Our case is distinguishable. In *Newsday,* the court expressed concern that reinstatement would "perpetuate a hostile, intimidating and offensive work

environment." (*Newsday, supra,* 915 F.2d at p. 845.) In our case, the reinstatement award was coupled with an order for Baldwin's reassignment to a different work site. In *Newsday*, the employee "ignored repeated warnings." (*Ibid.*) In our case, the arbitrator expressed "serious questions as to whether the Department effectively warned Grievant that he would, in fact, be terminated for further offenses of this policy." (See, e.g., *Chrysler Motors*, *supra*, 959 F.2d at p. 688 [arbitrator who ordered reinstatement "found it significant" that employee "had not received warnings or discipline for any prior misconduct before being discharged"]; *Communication Workers v. Southeastern Elec. Co-op.* (10th Cir. 1989) 882 F.2d 467, 470 [arbitrator premised reinstatement award in part on lack of "prior warnings of discharge if such an offense were repeated"]; *Super Tire Engineering Co. v. Teamsters Local Union No. 676, supra,* 721 F.2d at p. 123 [employee's reinstatement upheld where employer "did not warn him of an automatic sanction of discharge"].)

Beyond the factual distinctions between our case and *Newsday*, we have concerns about the strength of its analysis. In its public policy discussion, the *Newsday* court quoted from the governing federal regulation, which sets forth a number of possible steps for preventing sexual harassment in the workplace. (*Newsday*, *supra*, 915 F.2d at pp. 844-845.) But the court made no explicit attempt to apply the regulatory language, which suggests such employer responses such as "expressing strong disapproval, developing appropriate sanctions" and finding ways to sensitize employees about harassment. (*Ibid.*; 29 C.F.R. § 1604.11(f).) The court thus failed to explain its conclusion that dismissal of the offending employee was the only means of correcting or preventing future harassment. As this court indicated in *City of Palo Alto*, to vacate reinstatement on policy grounds, there must be a showing that "the public policy entails the obligation to automatically fire any employee" who engages in the offending

conduct. (*City of Palo Alto, supra,* 77 Cal.App.4th at p. 337.) That showing is absent from the analysis in *Newsday*.

In our view, the better reasoned case on this point is *Westvaco, supra,* 171 F.3d 971. There, the Fourth Circuit quoted federal case law and regulatory authority requiring employers to take " 'immediate and appropriate corrective action' " and " 'reasonable care to prevent and correct promptly any sexually harassing behavior.' " (*Id.* at p. 977.) The court found nothing in those requirements mandating automatic discharge for harassment. (*Ibid*.) The court thus concluded: "There is no public policy that every harasser must be fired." (*Ibid*.)

As further support for its contention that public policy militates against Baldwin's reinstatement, the City cites *Stroehmann, supra,* 969 F.2d 1436. Like *Newsday*, *Stroehmann* involved the vacatur of an arbitration award ordering reinstatement. (*Id.* at p. 1440.) "The district court vacated the award after concluding that there exists a well-established public policy against sexual harassment in the workplace and that the arbitrator's award violated that public policy by ordering reinstatement without a factual finding on the merits of the allegations against [the employee]." (*Ibid.*) In affirming, the Third Circuit determined that "a well-defined, dominant public policy favoring voluntary employer prevention and application of sanctions against sexual harassment in the workplace exists." (*Id.* at p. 1442.) The court further stated: "Under the circumstances present here, an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy." (*Ibid.*) In the court's view, such an award "undermines the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace." (*Ibid.*) The court concluded "that reinstatement of

this employee without a determination of the merits of the allegation violates public policy." (*Id.* at p. 1442.)

Our case is distinguishable. In *Stroehmann*, the arbitrator "did not make a finding on the merits of the sexual harassment allegation, and he neither considered nor respected the pertinent public policy." (*Stroehmann, supra,* 969 F.2d at p. 1443.) In our case, the arbitrator explicitly found that Baldwin had "committed two levels of offenses under the City's sexual harassment policy." Significantly, however, the arbitrator here also determined that "all violations of the sexual harassment policy do not warrant the ultimate penalty of termination under the City's own enforcement policies," and he further concluded that termination "was an excessive penalty" given Baldwin's "tenure of service, his prior disciplinary record, and all the circumstances disclosed in this record." Given these critical differences, *Stroehmann* does not dictate vacatur here.

Nor are we persuaded by the City's contention that Baldwin was reinstated on purely procedural grounds in violation of public policy. As explained below, that contention rests both on a mischaracterization of the arbitration award and on a misreading of this court's decision in *City of Palo Alto, supra,* 77 Cal.App.4th 327.

First, we reject the factual premise of the City's argument, which posits that the arbitration award was based solely on procedural grounds. As the award makes clear, the arbitrator relied on two distinct factors in concluding that the "ultimate penalty of termination" was unwarranted: first, that the penalty offended "established principles of progressive discipline" and second, that it was "excessive" given Baldwin's "tenure of service, his prior disciplinary record, and all the circumstances disclosed in [the] record." Among the circumstances described by the arbitrator were these: Baldwin "enjoyed playing jokes on other employees. He engaged other employees, both male and female, in a variety of

conduct and contact, much of which was inappropriate for the workplace." Baldwin seemed both to "misperceive" his relationships with co-workers and to lack "a well-defined sense of boundaries and of the personal space of others." But his "intentions may have been innocent," and "the type of jokes and pranks that he engaged in at various fire stations" where Baldwin worked for 16 years possibly "were received very differently than in the office setting, where he started working when he was promoted to Fire Inspector." Based on these and other circumstances, the arbitrator determined that Baldwin's misconduct did not justify termination. The award thus rested on grounds that termination was an excessive penalty as well as the lack of progressive discipline.

Second, we disagree with the City's interpretation of this court's decision in *City of Palo Alto, supra*, 77 Cal.App.4th 327. According to the City, that decision stands for the proposition that "arbitration awards reinstating terminated employees can indeed violate public policy . . . if the arbitrator's reason to reinstate the employee was based solely on procedural grounds." The City relies on the following passage from *City of Palo Alto*: "There is an argument to be made that reinstatement of an employee[] who made threats of violence, on purely procedural grounds, violates the public policy requiring an employer to provide a safe working environment." (*Id.* at p. 338.) The City reads too much into that dictum, particularly in light of the pertinent holding of the case, which undermines the City's argument.

As pertinent here, in *City of Palo Alto*, this court held that the employer had "not established that the public policy entails the obligation to *automatically fire* any employee who makes a threat of violence regardless of the employee's intent in uttering it and the actual risk to workplace safety and *regardless of the procedural guarantees secured by collective bargaining* and set forth in a memorandum of understanding between a union and a city." (*City of Palo Alto*,

supra, 77 Cal.App.4th at p. 337, italics added.) This court also explained: "While a city might be required to summarily place an employee on administrative leave to fulfill its duty of providing a safe workplace where the city has reasonable proof that an employee has made a credible threat of violence against a coworker, *nothing permits a city to entirely ignore the grievance procedures to which it agreed* when following them does not compromise workplace safety." (*Id.* at p. 337, italics added.) The holding of *City of Palo Alto* is consistent with "the unobjectionable general proposition that arbitrators' awards that reinstate discharged employees are not subject to judicial interference if the employer did not afford the employee industrial due process." (*Stroehmann*, *supra*, 969 F.2d at p. 1445.)

In sum, to justify reliance "on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars *reinstatement.*" (*Stead Motors, supra,* 886 F.2d at p. 1212.) Here, the City has not shown that "the policy is one that specifically militates against the relief ordered by the arbitrator." (*Id.* at pp. 1212-1213.)

Additionally, as we now explain, countervailing policies further undercut the City's position.

2. Countervailing policies

As the *Westvaco* court aptly observed, "the whole public policy path is a slippery one. One public policy too often runs headlong into another, and that is a reason for the contractual agreement to prevail." (*Westvaco, supra,* 171 F.3d at p. 978.) Here, at least two countervailing policies are at play.

First and foremost, there is the strong policy favoring arbitration, which dictates limited judicial review. (*Moncharsh, supra,* 3 Cal.4th at p. 32; *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 275.) More specifically, "labor law policy . . . favors determination of disciplinary questions

through arbitration when chosen as a result of labor-management negotiation." (*Eastern Coal, supra,* 531 U.S. at p. 65.) "The company and the union agreed in the [collective bargaining agreement] to allow an arbitrator to review disciplinary actions for just cause. The nullification of that bargain would 'undermine the federal labor policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored.' " (*Westvaco, supra,* 171 F.3d at p. 977, quoting *W.R. Grace*, 461 U.S. at p. 771.)

Second, there is a policy that favors upholding labor contract provisions, including those that require "just cause" to terminate an employee. That policy was at issue in *Westvaco, supra,* 171 F.3d at p. 975. As the court observed there, the labor agreement reflected "the mutual intentions of the parties to resolve disputes in a manner that preserves due process for employees as to both culpability and punishment." (*Id.* at p. 977.) Under the facts of that case, the employee's termination without progressive discipline violated the contractual just-cause requirement. (*Id.* at p. 976; see *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 770, fn. 13.)

In this case, the central question before the arbitrator was whether the City had just cause to terminate Baldwin.[4] In part, the arbitrator's negative answer to that question was based on the lack of progressive discipline, which city policy requires.[5] As the arbitrator found, "the City's Fire Department is fully committed

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[4] The parties' labor agreement provides that employees "shall only be disciplined for cause."

[5] The progressive discipline requirements are reflected both in the City's Policy Manual and in the Fire Department's Disciplinary Procedures Manual.

The City's Policy Manual is quoted in pertinent part in the arbitration award. It states: "The City's discipline process is based on the concept of progressive discipline. Under progressive discipline, the city takes progressively more severe action if the employee has not responded to previous instructions,

to the principles of progressive discipline." But the arbitrator also determined that those principles were not honored in this case. Baldwin had been informally counseled twice about sexual harassment, once in 1998 and again in 2002. But neither incident was "documented on the forms prescribed by the Fire Department's written policy for formal 'discipline,' and neither [was] placed in his personnel file." Given that "weak response" to the prior allegations of sexual harassment, the arbitrator found, "there are serious questions as to whether the Department effectively warned Grievant that he would, in fact, be terminated for further offenses of this policy." The arbitrator thus concluded that "the ultimate penalty of termination for all proven offenses, particularly in view of the City's prior lax disciplinary response . . . was contrary to the established principles of progressive discipline and was an excessive penalty in view of Grievant's tenure of service, his prior disciplinary record, and all the circumstances disclosed in this record."

The decision to reinstate Baldwin – with a 30-day suspension and a final warning – was within the scope of the arbitrator's authority. Under the parties' labor agreement, the arbitrator was charged with determining whether the employee's "conduct was so serious that progressive discipline was not warranted." (*California School Employees Assn. v. Bonita Unified School Dist.*

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warnings, or other lower-level actions. However, progressive discipline does not mean that the City must progress through all discipline steps in all cases. Certain cases may be serious enough that the first incident may warrant a higher level of discipline, up to and including termination without progressive discipline."

The Fire Department's Disciplinary Procedures Manual likewise is excerpted in the arbitration award. It states: "In progressive discipline, the steps normally followed are: [¶] 1. Counseling [¶] 2. Documented Oral Counseling [¶] 3. Written Repremend [¶] 4. Formal Discipline." It then identifies the following seven "Levels of Discipline: [¶] Oral Counseling [¶] Documented Oral Counseling [¶] Written Reprimand [¶] Step Reduction [¶] Suspension [¶] Demotion [¶] Termination."

(2008) 163 Cal.App.4th 387, 405, italics omitted; see also, e.g., *Stead Motors, supra,* 886 F.2d at p. 1217 ["it is the function of the arbitrator, not the courts, to make assessments with respect to appropriate punishments"].) Here, the reinstatement decision was based on factual findings by the arbitrator that termination "was contrary to the established principles of progressive discipline" and that it "was an excessive penalty" under the circumstances. Settled law requires us to defer to those findings. (See *Moncharsh, supra,* 3 Cal.4th at p. 11.) Of course, neither the arbitrator's determination, nor our decision to confirm it, should be mistaken for approval of Baldwin's reprehensible behavior. To paraphrase *Eastern Coal*, the "award does not condone [Baldwin's] conduct or ignore the risk" to his co-workers. (*Eastern Coal, supra,* 531 U.S. at p. 65.) "Rather, the award punishes [Baldwin] by suspending him . . . and it makes clear . . . that one more [incident] means discharge." (*Id.* at pp. 65-66.)

3. Conclusion

We find no public policy basis for vacating the arbitrator's decision to reinstate Baldwin. An arbitration award may be set aside on public policy grounds only when it "contravenes 'an explicit legislative expression of public policy.' " (*City of Palo Alto, supra,* 77 Cal.App.4th at p. 334, quoting *Moncharsh, supra,* 3 Cal.4th at p. 32.) The award here does not meet that standard. Although there is a well-defined public policy against sexual harassment in the workplace, that policy does not mandate automatic discharge of an offending employee, particularly where, as here, the discharge violates progressive discipline principles reflected in the governing labor agreement and the employer's own policies. (*City of Palo Alto,* at p. 337.)

III. Sanctions

A. The Union's Request for Sanctions

In its respondent's brief on appeal, the Union seeks sanctions and damages against the City for bringing a frivolous appeal. The Union also filed a separate motion in this court seeking to lift the stay on the judgment, or, in the alternative, to dismiss the City's appeal as frivolous. The Union's separate motion does not request sanctions or other monetary relief, however.

The Union's request for sanctions is denied for noncompliance with the governing rule. (Cal. Rules of Court, rule 8.276.) "A party seeking sanctions on appeal must file a separate motion for sanctions that complies with the requirements of" the governing rule. (*Kajima Engineering and Construction Company, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402, citing predecessor rules.) Such a motion "must include a declaration supporting the amount of any monetary sanction sought and must be served and filed before any order dismissing the appeal but no later than 10 days after the appellant's reply brief is due." (Cal. Rules of Court, rule 8.276(b)(1).) A party failing to comply with these requirements is "not entitled to be heard on the subject." (*Kajima Engineering and Construction Company, Inc. v. Pacific Bell,* at p. 1402.) In this case, the Union did not seek monetary sanctions in its separate motion, nor did its supporting declaration address the point. We therefore deny the Union's request for sanctions. (*Ibid.*)

As noted above, the Union did file a separate motion seeking other relief – a lifting the judgment stay, or, alternatively, dismissal of the City's appeal as frivolous. Given our resolution of this case on its merits, that motion will be denied as moot.

B. The City's Motion for Sanctions

The City filed a separate motion in this court, seeking sanctions against the Union on the ground that the Union's motion is frivolous.

The City's motion is denied. A reviewing court may impose sanctions against a party for filing a frivolous motion. (Cal. Rules of Court, rule 8.276(a)(3).) To warrant sanctions under governing case law, the motion must have been brought for an improper motive, such as harassment or delay, or it must be indisputably meritless. (*Gravillis, supra,* 182 Cal.App.4th at p. 520.) The Union's motion does not qualify under that standard. Although the Union's request for sanctions is procedurally defective, its motion to lift the stay or, alternatively, to dismiss the appeal is not. Nor is the Union's motion for such relief indisputably meritless. For those reasons, sanctions are not warranted.

DISPOSITION

The judgment is affirmed. Respondent shall have costs on appeal. Both parties' requests for sanctions are denied. Respondent's motion to lift the judgment stay or dismiss the appeal is denied as moot.

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McAdams, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Mihara, J.